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**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA**

Benjamin Freeman,

Plaintiff,

V.

Ryan Thornell, et al.,

Defendants.

No. CV-23-02324-PHX-JAT (JZB)

**ORDER AND
ORDER TO SHOW CAUSE**

I. Procedural History

On July 24, 2023, Plaintiff Benjamin Freeman, who is confined in the Arizona State Prison Complex-Yuma, filed a Complaint (Doc. 1-3 at 2-19)¹ in the Superior Court of Yuma County, Arizona, against 26 Defendants. On November 7, 2023, Defendant Justin A. Newsome filed a Notice of Removal and removed the case to this Court. On November 16, 2023, Plaintiff filed a Motion for Extraordinary Relief (Doc. 4), and on November 17, 2023, he filed a First Amended Complaint (Doc. 5), which superseded the original Complaint in its entirety. On December 11, 2023, Plaintiff filed a Motion to Appoint Counsel (Doc. 6).

II. Removal

A state court defendant may remove to federal court any civil action brought in the state court over which the federal district courts would have original jurisdiction. 28 U.S.C.

¹ The citation refers to the document and page number generated by the Court's Case Management/Electronic Case Filing system.

1 § 1441(a). In his Complaint, Plaintiff alleges, among other things, that Defendants violated
 2 his Eighth and Fourteenth Amendment rights and his rights under the Americans with
 3 Disabilities Act. This Court’s jurisdiction extends to such claims. *See* 28 U.S.C. § 1331
 4 (a federal court has original jurisdiction “of all civil actions arising under the Constitution,
 5 laws, or treaties of the United States”). The Notice of Removal was filed within 30 days
 6 of Defendant Justin A. Newsome being served, and Newsome indicates that Defendant
 7 Diana Curd, the only other served Defendant, consents to removal. It therefore appears
 8 this case was timely and properly removed.

9 **III. Statutory Screening of Prisoner Complaints**

10 The Court is required to screen complaints brought by prisoners seeking relief
 11 against a governmental entity or an officer or an employee of a governmental entity. 28
 12 U.S.C. § 1915A(a). The Court must dismiss a complaint or portion thereof if a plaintiff
 13 has raised claims that are legally frivolous or malicious, that fail to state a claim upon which
 14 relief may be granted, or that seek monetary relief from a defendant who is immune from
 15 such relief. 28 U.S.C. § 1915A(b)(1)–(2).

16 A pleading must contain a “short and plain statement of the claim *showing* that the
 17 pleader is entitled to relief.” Fed. R. Civ. P. 8(a)(2) (emphasis added). While Rule 8 does
 18 not demand detailed factual allegations, “it demands more than an unadorned, the-
 19 defendant-unlawfully-harmed-me accusation.” *Ashcroft v. Iqbal*, 556 U.S. 662, 678
 20 (2009). “Threadbare recitals of the elements of a cause of action, supported by mere
 21 conclusory statements, do not suffice.” *Id.*

22 “[A] complaint must contain sufficient factual matter, accepted as true, to ‘state a
 23 claim to relief that is plausible on its face.’” *Id.* (quoting *Bell Atlantic Corp. v. Twombly*,
 24 550 U.S. 544, 570 (2007)). A claim is plausible “when the plaintiff pleads factual content
 25 that allows the court to draw the reasonable inference that the defendant is liable for the
 26 misconduct alleged.” *Id.* “Determining whether a complaint states a plausible claim for
 27 relief [is] . . . a context-specific task that requires the reviewing court to draw on its judicial
 28 experience and common sense.” *Id.* at 679. Thus, although a plaintiff’s specific factual

1 allegations may be consistent with a constitutional claim, a court must assess whether there
 2 are other “more likely explanations” for a defendant’s conduct. *Id.* at 681.

3 But as the United States Court of Appeals for the Ninth Circuit has instructed, courts
 4 must “continue to construe *pro se* filings liberally.” *Hebbe v. Pliler*, 627 F.3d 338, 342
 5 (9th Cir. 2010). A “complaint [filed by a *pro se* prisoner] ‘must be held to less stringent
 6 standards than formal pleadings drafted by lawyers.’” *Id.* (quoting *Erickson v. Pardus*, 551
 7 U.S. 89, 94 (2007) (per curiam)).

8 **IV. Background**

9 After a jury trial, on October 28, 2015, Plaintiff was convicted of one count of
 10 fraudulent schemes and artifices, two counts of third-degree burglary, two counts of taking
 11 the identity of another, three counts of theft of a credit card, one count of forgery, and one
 12 count of criminal possession of a forgery device. The trial court imposed concurrent and
 13 consecutive prison terms totaling 25.75 years.

14 **V. First Amended Complaint**

15 In his three-count First Amended Complaint, Plaintiff sues the following current
 16 and former employees of the Maricopa County Superior Court: retired Court Reporter Jane
 17 Westlund, Bailiff Carrie Montoya, Judge Joseph C. Welty,² and retired Judge David
 18 Cunanan. Plaintiff also sues Prosecutor Kristy Perkins, Maricopa County Board of
 19 Supervisors member Clint Hickman, and Director of the Office of Public Defense
 20 Rosemarie Pena Lynch. Plaintiff asserts violations of his Sixth Amendment right to a fair
 21 trial and appeal. He seeks monetary relief and that the Court “order that the transcripts are
 22 false.”

23 In Count One, Plaintiff asserts a claim of prosecutorial misconduct. He alleges that
 24 on October 28, 2015, the last day of his criminal trial, Defendant Westlund was the court
 25 reporter. Plaintiff asserts that during that day’s proceedings, “three or more stenographic
 26 malfunctions” occurred. Plaintiff claims Defendant Montoya was not properly trained to
 27 proficiently operate the court’s “for the record,” or FTR, system, and as a result,

² Plaintiff names Judge Welty as “John Welty.”

1 exculpatory testimony by a witness, Detective Chris Thomas, was lost or destroyed.
2 Plaintiff contends the first malfunction was never reported to the trial court and was not
3 labeled in parentheses in the trial transcript. Plaintiff alleges that while Defendant
4 Westlund repaired her stenograph, and the FTR was not recording, the prosecutor pulled
5 out the court's projector, dimmed the courtroom lights, and showed jurors evidence that
6 the trial court and the State had "predetermined was a mooted issue."

7 Plaintiff alleges that Defendant Westlund falsified the trial transcripts by
8 intentionally inserting 33 lines of false testimony of a witness into the official record.
9 Plaintiff contends Defendant Westlund also falsified "data transcriptions" in the trial
10 transcripts. Plaintiff claims he relied on the "falsified" transcripts when he filed his direct
11 appeal and six post-conviction motions, and his reliance caused him "damages."

12 In Count Two, Plaintiff alleges that on December 28, 2022, Defendant Montoya
13 informed Plaintiff's private investigator, Mark Hebert, that she worked as a bailiff in
14 Defendant Cunanan's court in 2015 and was responsible for the operation of the FTR
15 system during Plaintiff's criminal trial. Plaintiff asserts that Defendant Montoya told
16 Hebert that when she became a bailiff, she did not receive any formal training regarding
17 operating the FTR system, and someone had "simply show[n her] how to run the system."
18 Plaintiff claims Defendants Cunanan, Hickman, Welty, and Lynch "breached their
19 ministerial duties" by failing to adequately train Defendant Montoya to proficiently operate
20 the trial court's FTR "override feature" and the "camera switching" as required, while
21 Defendant Westlund repaired the stenograph and a witness presented exculpatory evidence
22 that had "already been mooted." Plaintiff contends that as a result of Montoya's "lack of
23 education of the FTR system," she was responsible for Plaintiff's inability to see the
24 witness testify. As his injury, Plaintiff alleges his appeal and post-conviction relief motions
25 were "decided on" Defendant Montoya's faulty operation of the FTR and her inadequate
26 training regarding operation of the FTR system.

27 In Count Three, Plaintiff alleges that Defendant Hickman and other members of the
28 Maricopa County Board of Supervisors and Defendants Welty, Cunanan, and Lynch were

1 responsible for the appointment, hiring, and salaries of the personnel directly connected
 2 with the courts. Plaintiff asserts that by assigning Defendant Montoya as a bailiff and
 3 “failing to adequately provide more and different training and supervision” of Montoya,
 4 Defendants were deliberately indifferent. Plaintiff claims Defendants breached their
 5 administrative duties by failing to adequately train Defendant Montoya.

6 VI. Failure to State a Claim

7 To prevail in a § 1983 claim, a plaintiff must show that (1) acts by the defendants
 8 (2) under color of state law (3) deprived him of federal rights, privileges or immunities and
 9 (4) caused him damage. *Thornton v. City of St. Helens*, 425 F.3d 1158, 1163-64 (9th Cir.
 10 2005) (quoting *Shoshone-Bannock Tribes v. Idaho Fish & Game Comm'n*, 42 F.3d 1278,
 11 1284 (9th Cir. 1994)). In addition, a plaintiff must allege that he suffered a specific injury
 12 as a result of the conduct of a particular defendant and he must allege an affirmative link
 13 between the injury and the conduct of that defendant. *Rizzo v. Goode*, 423 U.S. 362, 371-
 14 72, 377 (1976).

15 A. Prosecutorial Immunity

16 Prosecutors are absolutely immune from liability for damages under § 1983 for their
 17 conduct in “initiating a prosecution and in presenting the State’s case” insofar as that
 18 conduct is “intimately associated with the judicial phase of the criminal process.” *Buckley*
 19 *v. Fitzsimmons*, 509 U.S. 259, 270 (1993) (quoting *Imbler v. Pachtman*, 424 U.S. 409, 430-
 20 31 (1976)). Immunity even extends to prosecutors for “eliciting false or defamatory
 21 testimony from witnesses or for making false or defamatory statements during, and related
 22 to, judicial proceedings.” *Buckley*, 509 U.S. at 270; *see also Broam v. Bogan*, 320 F.3d
 23 1023, 1029-30 (9th Cir. 2003) (prosecutor absolutely immune from liability for failure to
 24 investigate the accusations against a defendant before filing charges; for knowingly using
 25 false testimony at trial; and for deciding not to preserve or turn over exculpatory material
 26 before trial, during trial, or after conviction); *Roe v. City & County of S.F.*, 109 F.3d 578,
 27 583-84 (9th Cir. 1997) (absolute immunity for decision to prosecute or not to prosecute
 28 and for professional evaluation of a witness and evidence assembled by the police).

1 Plaintiff's allegations against Defendant Perkins pertain only to her role as the
 2 prosecutor in Plaintiff's criminal trial. Defendant Perkins is absolutely immune for such
 3 conduct and will be dismissed.

4 **B. Defendant Lynch**

5 A prerequisite for any relief under 42 U.S.C. § 1983 is a showing that the defendant
 6 has acted under the color of state law. An attorney representing a criminal defendant does
 7 not act under color of state law. *See Polk County v. Dodson*, 454 U.S. 312, 325 (1981);
 8 *see also Szijarto v. Legeman*, 466 F.2d 864, 864 (9th Cir. 1972) (per curiam) (“[A]n
 9 attorney, whether retained or appointed, does not act ‘under color of’ state law.”). Thus,
 10 Plaintiff cannot state a § 1983 claim against Defendant Lynch, who will be dismissed.

11 **C. Defendant Westlund**

12 A prisoner's claim for damages cannot be brought under 42 U.S.C. § 1983 if “a
 13 judgment in favor of the plaintiff would necessarily imply the invalidity of his conviction
 14 or sentence,” unless the prisoner demonstrates that the conviction or sentence has
 15 previously been reversed, expunged, or otherwise invalidated. *Heck v. Humphrey*, 512
 16 U.S. 477, 486-87 (1994). Plaintiff's claims that Defendant Westlund falsified trial
 17 transcripts necessarily imply the invalidity of his convictions, and he has not alleged or
 18 shown that his convictions have been reversed, expunged, or otherwise invalidated. Thus,
 19 Plaintiff's claim for money damages against Defendant Westlund has not accrued. *See*
 20 *Rose v. Paterson*, 152 F. App'x 589 (9th Cir. 2005) (concluding that prisoner's claim that
 21 court reported falsified transcripts of criminal trial and subsequent hearings was barred by
 22 *Heck* because “the assessment of damage, if any, for an inaccurate transcript would be
 23 measured by its effect on [plaintiff's] ability to challenge his criminal conviction on
 24 appeal”). The Court will therefore dismiss Plaintiff's claims against Defendant Westlund.

25 **VII. Order to Show Cause**

26 Failure to state a claim includes circumstances where a defense is “complete and
 27 obvious from the face of the pleadings.” *Franklin v. Murphy*, 745 F.2d 1221, 1228 (9th
 28 Cir. 1984), *abrogated on other grounds by Neitzke v. Williams*, 490 U.S. 319 (1989). In

1 the absence of waiver, the Court may raise the defense of statute of limitations sua sponte.
 2 *See Levald, Inc. v. City of Palm Desert*, 998 F.2d 680, 687 (9th Cir. 1993); *see also Hughes*
 3 *v. Lott*, 350 F.3d 1157, 1163 (11th Cir. 2003) (upholding sua sponte dismissal under 28
 4 U.S.C. § 1915(e)(2)(B)(i) of prisoner’s time-barred complaint).

5 The applicable statute of limitations in an action under 42 U.S.C. § 1983 is the forum
 6 state’s statute of limitations for personal injury actions. *Wilson v. Garcia*, 471 U.S. 261,
 7 276 (1985). The Arizona statute of limitations for personal injury actions is two years. *See*
 8 Ariz. Rev. Stat. § 12-542(1).

9 Accrual of § 1983 claims is governed by federal law. *Wallace v. Kato*, 549 U.S.
 10 384, 388 (2007). Under federal law, a claim accrues when the plaintiff “knows or has
 11 reason to know of the injury that is the basis of the action.” *Pouncil v. Tilton*, 704 F.3d
 12 568, 574 (9th Cir. 2012); *Cabrera v. City of Huntington Park*, 159 F.3d 374, 381 (9th Cir.
 13 1998). Thus, to be timely, Plaintiff’s claims must have accrued no more than two years
 14 before his Complaint was filed on July 23, 2023.

15 Plaintiff’s allegations concern an incident that occurred during his criminal trial on
 16 October 28, 2015. Absent some basis for tolling, which does not appear on the face of the
 17 First Amended Complaint, his claims are barred by the statute of limitations. The Court
 18 will require Plaintiff, within 30 days of the filing date of this Order, to show cause, in
 19 writing, why Plaintiff’s failure-to-train claims against Defendants Welty, Cunanan,
 20 Hickman, and Lynch should not be dismissed as barred by the statute of limitations.

21 **VIII. Plaintiff’s Motions**

22 In his Motion for Extraordinary Relief, Plaintiff seeks appointment of counsel in
 23 this case and injunctive relief with respect to the prison library and librarian. Plaintiff states
 24 that the library at ASPC-Yuma Cibola Unit is open for an average of 15 to 20 hours per
 25 week, which is not enough time to accommodate the 1,000 prisoners in Cibola Unit.
 26 Plaintiff states he is “unable to talk to prisoners for help,” and the legal monitor and
 27 Complex Warden “refuse to do anything to give [prisoners] access.”

28 Plaintiff asserts that the librarian, Ms. Lugo, gives prisoners’ confidential

1 information to staff. Plaintiff claims that after Defendant Curd was served, when Plaintiff
 2 was in the medical unit, the state's attorney called the medical unit, spoke to security
 3 medical staff, and "mentioned" Plaintiff's name. Plaintiff asked the officer who had asked
 4 for Plaintiff's name, and the officer said it was "some lawyer wanting to know where you
 5 were." The next day, another prisoner told Plaintiff that he had heard Ms. Lugo talking to
 6 an attorney on the telephone, and Lugo had "repeated the attorney's instructions" that Lugo
 7 inform Defendant Curd "to not worry about [Plaintiff's] lawsuit" because the case was
 8 moving to federal court, and they would "have the Judge dismiss this case."

9 Plaintiff asserts that Ms. Lugo "provides unauthorized legal advice to prisoners,"
 10 including telling Plaintiff that he cannot serve "State Defendants" with summons and a
 11 complaint without having their full first and last names. Plaintiff "took Lugo's advice as
 12 being a representative of the State in her 'law librarian' capacity in charge of legal resource
 13 materials." Plaintiff claims this "unauthorized legal advice persuaded and discouraged"
 14 Plaintiff, and as a result, he filed a motion to dismiss his civil lawsuit in Yuma County
 15 Superior Court.

16 Plaintiff asks the Court to appoint counsel to represent him in this matter, order that
 17 the library be open eight hours per day, every day, and order Ms. Lugo to "stop giving staff
 18 personal confidential information before the lawsuit is filed."

19 With respect to appointment of counsel, there is no constitutional right to the
 20 appointment of counsel in a civil case. *See Ivey v. Bd. of Regents*, 673 F.2d 266, 269 (9th
 21 Cir. 1982). In proceedings in forma pauperis, the court may request an attorney to represent
 22 any person unable to afford one. 28 U.S.C. § 1915(e)(1). Appointment of counsel under
 23 28 U.S.C. § 1915(e)(1) is required only when "exceptional circumstances" are present.
 24 *Terrell v. Brewer*, 935 F.2d 1015, 1017 (9th Cir. 1991). A determination with respect to
 25 exceptional circumstances requires an evaluation of the likelihood of success on the merits
 26 as well as the ability of Plaintiff to articulate his claims pro se in light of the complexity of
 27 the legal issue involved. *Id.* "Neither of these factors is dispositive and both must be
 28 viewed together before reaching a decision." *Id.* (quoting *Wilborn v. Escalderon*, 789 F.2d

1 1328, 1331 (9th Cir. 1986)).

2 Having considered both elements, it does not appear at this time that exceptional
 3 circumstances are present that would require the appointment of counsel in this case.
 4 Plaintiff is in no different position than many pro se prisoner litigants. Thus, the Court will
 5 deny without prejudice request for appointment of counsel.

6 Plaintiff seeks injunctive relief with respect to his requests regarding the library and
 7 Ms. Lugo. Because the Court will dismiss the Complaint, there are no claims before the
 8 Court. Thus, the Court will deny Plaintiff's requests for injunctive relief. Plaintiff should
 9 note that to seek injunctive relief under Rule 65 of the Federal Rules of Civil Procedure,
 10 he must show: (1) he is likely to succeed on the merits; (2) he is likely to suffer irreparable
 11 harm in the absence of injunctive relief; (3) the balance of equities tips in his favor; and (4)
 12 an injunction is in the public interest. *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S.
 13 7, 20 (2008).

14 Where a plaintiff seeks a mandatory injunction, rather than a prohibitory injunction,
 15 injunctive relief is "subject to a higher standard" and is "permissible when 'extreme or very
 16 serious damage will result' that is not 'capable of compensation in damages,' and the merits
 17 of the case are not 'doubtful.'" *Hernandez v. Sessions*, 872 F.3d 976, 999 (9th Cir. 2017)
 18 (quoting *Marlyn Nutraceuticals, Inc. v. Mucos Pharma GmbH & Co.*, 571 F.3d 873, 879
 19 (9th Cir. 2009)). Further, under the Prison Litigation Reform Act, injunctive relief must
 20 be narrowly drawn and be the least intrusive means necessary to correct the harm. 18
 21 U.S.C. § 3626(a)(2); see *Gilmore v. People of the State of Cal.*, 220 F.3d 987, 999 (9th Cir.
 22 2000).

23 A court may issue an injunction against a non-party only where the non-party acts
 24 in active concert or participation with an enjoined party. Fed. R. Civ. P. 65(d)(2) (a
 25 preliminary injunction only binds those who receive actual notice of it by personal service
 26 or are parties, their officers, agents, servants, employees, and attorneys, and persons in
 27 active concert); see *Zepeda v. INS*, 753 F.2d 719, 727 (9th Cir. 1985) ("A federal court may
 28 issue an injunction if it has personal jurisdiction over the parties and subject matter

1 jurisdiction over the claim; it may not attempt to determine the rights of persons not before
 2 the court.”); *see also Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100, 110
 3 (1969).

4 The Court lacks jurisdiction over claims for injunctive relief that are not related to
 5 the claims pleaded in the operative complaint. *See Pac. Radiation Oncology, LLC v.*
 6 *Queen's Med. Center*, 810 F.3d 631, 636 (9th Cir. 2015) (“[w]hen a plaintiff seeks
 7 injunctive relief based on claims not pled in the complaint, the court does not have the
 8 authority to issue an injunction”); *see also Devose v. Herrington*, 42 F.3d 470, 471 (8th
 9 Cir. 1994) (per curiam) (a party seeking injunctive relief must establish a relationship
 10 between the claimed injury and the conduct asserted in the complaint); *see also Prince v.*
 11 *Schriro, et al.*, CV-08-1299-PHX-SRB, 2009 WL 1456648, at *4 (D. Ariz. May 22, 2009)
 12 (unless a claim concerns access to the courts, the Plaintiff must show a nexus between the
 13 relief sought and the claims in the lawsuit.).

14 **IX. Warnings**

15 **A. Address Changes**

16 Plaintiff must file and serve a notice of a change of address in accordance with Rule
 17 83.3(d) of the Local Rules of Civil Procedure. Plaintiff must not include a motion for other
 18 relief with a notice of change of address. Failure to comply may result in dismissal of this
 19 action.

20 **B. Possible Dismissal**

21 If Plaintiff fails to timely comply with every provision of this Order, including these
 22 warnings, the Court may dismiss this action without further notice. *See Ferdik v. Bonzelet*,
 23 963 F.2d 1258, 1260-61 (9th Cir. 1992) (a district court may dismiss an action for failure
 24 to comply with any order of the Court).

25 **IT IS ORDERED:**

26 (1) Plaintiff’s Motion for Extraordinary Relief (Doc. 4) and Motion for
 27 Appointment of Counsel (Doc. 6) are **denied**.

28 (2) Defendants Westlund, Lynch, and Perkins are **dismissed without prejudice**.

(3) Plaintiff is **ORDERED TO SHOW CAUSE**, in writing, within **30 days** of the filing date of this Order, why his claims against Defendants Montoya, Welty, Cunanan, and Hickman should not be dismissed as barred by the statute of limitations. **Plaintiff's response shall be limited to this issue.**

(4) If Plaintiff fails to file a response to the Order to Show Cause within **30 days** of the date this Order is filed, the Clerk of Court must enter a judgment of dismissal of this action without further notice to Plaintiff.

Dated this 12th day of January, 2024.


James A. Teilborg
Senior United States District Judge